U.S. CHAMBER OF COMMERCE

The NLRB's War on Waivers

Arbitration Agreements and the Rule of Law

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Introduction

Under the administration of President Obama, the Democratic majority of the National Labor Relations Board ("NLRB" or "Board") has taken an expansive view of how the National Labor Relations Act ("NLRA" or "Act") should be enforced. In particular, it has followed an extremely broad reading of Section 7 of the NLRA, which protects the right of employees "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"[1] The result is that the Board has repeatedly stretched the boundaries of logic and common sense to punish employers for allegedly interfering with the exercise of concerted activity. Often, these unfair labor practice charges (ULPs) involve the employee handbook, with the NLRB repeatedly striking down widely-accepted policies that employers have maintained without controversy for years to promote safe workplaces, ensure efficient operations, and prevent discrimination.[2]

This overzealous enforcement of Section 7 has also led the Board to take on class action waivers contained in employment arbitration agreements, which are intended to speed resolution of workplace disputes and reduce the burden of unnecessary litigation. Given its view of Section 7, the Board has argued that these waivers deprive employees of their right to engage in concerted activity. However, many courts that have examined the issue have disagreed, leading to an unusual back-and-forth on class action waivers over the past four years. This clash between two branches of government has seen numerous federal courts admonish the Board for striking down class action waivers and the Board reject those federal court decisions in a misguided application of its non-acquiescence policy. This legal maneuvering has finally resulted in a circuit split that may pave the way for action by the Supreme Court.

1 Section 7 of the Act, 29 U.S.C. § 157.

2 U.S. Chamber of Commerce, Theater of the Absurd (2015), *available at* https://www.uschamber.com/report/theater-the-absurd-the-nlrb-takes-the-employee-handbook.

Background on Class Action Waivers and the Courts

Class action waivers are provisions in employment arbitration agreements that require employees and employers to resolve employment disputes individually through binding arbitration rather than collectively in courts of law. The Federal Arbitration Act of 1925 ("FAA") established a "liberal federal policy favoring arbitration agreements,"[3] and indeed, arbitration agreements have been widely used for nearly a century in the commercial context.

Arbitration agreements in the employment realm first came to national prominence in 1991 with the Supreme Court case *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). There, the Supreme Court compelled arbitration of an Age Discrimination in Employment Act ("ADEA") lawsuit brought by a securities representative whose New York Stock Exchange registration contained an arbitration agreement. Although the employee brought only an individual claim, he argued that because the arbitration agreement did not allow class actions, upholding the agreement would be contrary to the purposes of the ADEA. The Supreme Court rejected this reasoning, stating that "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred."[4] In other words, collective actions were permitted by the statute, but they were by no means required.

This clash between two branches of government has seen numerous federal courts admonish the Board for striking down class action waivers and the Board reject those federal court decisions pursuant to its openly-declared non-acquiescence policy.

Thus, individual employment arbitration agreements, known initially as Gilmer Agreements, were born. Three years later, they received a substantial boost from President Clinton's Dunlop Commission, which had been established by the Secretaries of Commerce and Labor to examine the laws and regulations governing the workplace and to provide policy recommenda-

3 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

4 *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (internal citations and quotations omitted).

tions.[5] On December 1, 1994, the Dunlop Commission issued its long-anticipated Final Report, one of the purposes of which was to investigate methods to "increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies."[6] In light of the 400% increase in federal court lawsuits asserting employment-related claims and grievances between 1971-1991, the "stressful and unsatisfying" litigation process, and the "significant costs" of litigation which, the report noted, resulted in fewer resources being available for employee wages and benefits, the Dunlop Commission specifically recommended and encouraged the use of private employment arbitration.[7]

With the blessing of the Supreme Court and the encouragement of President Clinton's Dunlop Commission, employers began adopting arbitration agreements both with and without class action waivers. For more than 20 years, the Board raised no objection to these agreements. That, however, was to change during the Obama administration.

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On June 16, 2010, shortly after President Obama's Democratic appointees became the majority on the Board, the NLRB's General Counsel, who had been appointed by President George W. Bush, issued a memorandum (10-06) on class action waivers in light of "issues [that] have arisen regarding the validity of mandatory arbitration agreements that prohibit arbitrators from hearing class action employment claims[.]"[8]

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5 The Dunlop Commission on the Future of Worker-Management Relations: Final Report 3-6 (1994), *available at* https://www.dol.gov/_sec/media/reports/dunlop/preface.htm.

6 *Id.* at 3-14.

7 *Id.* at 81-82, *available at* https://www.dol.gov/_sec/media/reports/dunlop/section4.htm.

8 Ronald Meisburg, National Labor Relations Board Office of General Counsel, *Guide-*

While noting that a "mandatory arbitration agreement that could reasonably be read by an employee as prohibiting him or her from joining with other employees to file a class action lawsuit is unlawful," Memorandum 10-06 concluded such a waiver would not be a *per se* violation so long as it "makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer . . . ."[9] As long as those rights are preserved, it said, "no violation of the Act will be found."[10] In other words, employers could require employees to sign properly-worded waivers, employees could still attempt to engage in class actions, and employers could use those waivers to seek to have class action claims dismissed. The courts, not the Board, would ultimately determine whether a class action could proceed.

On January 3, 2012, in a 2-0 decision with the lone Republican member recused, the Board held that nationwide homebuilder D.R. Horton's mandatory class and collective action waiver violated Section 8(a)(1) of the NLRA by depriving employees of the right to engage in concerted, protected activity.

The Board Takes a Stand in *D.R. Horton*

In the face of the Democrat Board majority, Memorandum 10-06 did not stand for long. On January 3, 2012, in a 2-0 decision with the lone Republican member recused, the Board held that nationwide homebuilder D.R. Horton's mandatory class and collective action waiver violated Section 8(a)(1) of the NLRA by depriving employees of the right to engage in concerted, protected activity.[11] The Board made four arguments to support its decision: (1) an employee's ability to pursue workplace grievances collectively, including

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line Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies, Memorandum GC 10-06, 2010 NLRB GCM LEXIS 64, at *1 (June 16, 2010).

9 *Id.* at *10, 18-19.

10 *Id.* at *10.

11 *D.R. Horton, Inc.*, 357 NLRB 2277 (2012).

through litigation, is a substantive right, (2) by prohibiting the exercise of this substantive right, class action waivers violate the NLRA, (3) the NLRA does not conflict with the FAA because arbitration agreements may not require a party to forgo a substantive right, and (4) even if the statutes did conflict, the FAA would yield to the terms of the Norris-LaGuardia Act because it was passed seven years after the FAA.

The Board's reasoning in *D.R. Horton*, however, was tenuous at best. For instance, the Board stated that "the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation," a holding it asserted that it "has long held, with uniform judicial approval" and "has been uniformly upheld by the courts of appeals."[12] In support of this declaration of "uniform judicial approval" the Board failed to cite any specific case holdings, but rather pointed to *dicta* from two courts of appeals decisions, neither of which involved the rights of employees to pursue collective action under the NLRA.[13] Still, the Board was quick to dismiss other *dicta* that did not support its declaration of "uniform judicial approval." Specifically, with regard to the Supreme Court's language in *Gilmer*—"the possibility of collective action does not mean that individual attempts at conciliation were intended to be barred"—the Board dismissed it as "not relevant to the question of com-

12 *Id.* at 2278.

13 *Id.* at 2278. The Board cited *Brady v. National Football League,* 644 F.3d 661, 673 (8th Cir. 2011) and *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188, 340 U.S. App. D.C. 391 (D.C. Cir. 2000). *Mohave* involved an alleged retaliatory discharge, and *Brady* involved an injunction issued under the Norris-LaGuardia Act. Notably, the dicta in *Brady* cited by the Board in support of *D.R. Horton*, that "a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act," did not in fact support the Board's assertion. The Eighth Circuit in Brady was discussing a hypothetical situation that it clearly did not accept. The full quote by the Eighth Circuit states, "If the NLGA nonetheless were construed to require concerted activity by employees to establish a labor dispute, a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is "concerted activity" under § 7 of the National Labor Relations Act." *Id.* at 673.

pelled waiver of NLRA rights at issue here."[14]

In selectively choosing the language and cases in support of its conclusion, the Board downplayed the Supreme Court's strongly-articulated support for arbitration agreements under the FAA, expressed just months earlier in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and instead, summarily held that *D.R. Horton* was distinguishable from *AT&T* since class actions were the type of substantive right that the FAA left "undisturbed." This last argument was surprising since the Board actually cited two federal district court cases holding that class action waivers do not violate the NLRA. Finally, the Board's decision not only expressly rejected the balanced approach contained in Memorandum 10-06, but also led the Board to conclude that its own General Counsel's memo "defies logic," is "clearly wrong as a categorical matter," and "takes an erroneous view."[15]

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Rejection of *D.R. Horton* in the Courts

Shortly after the Board issued *D.R. Horton*, the Supreme Court reaffirmed its support for arbitration agreements. In *CompuCredit Corporation v. Greenwood*, 132 S. Ct. 665 (2012) the Court affirmed by an 8-1 majority that only a contrary congressional command could override the FAA's requirement that courts enforce arbitration agreements. With *CompuCredit* in mind, courts of appeals began rejecting the Board's views as expressed in *D.R. Horton*.

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14 *D.R. Horton, Inc.*, 357 NLRB at 2286. The Supreme Court later described this language in *Gilmer* as indicating that it had "no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the Age Discrimination in Employment Act, expressly permitted collective actions." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

15 *D.R. Horton, Inc.*, 357 NLRB at 2282-83.

First, in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), a three-judge panel of the Eighth Circuit declined the plaintiff's invitation to "follow the NLRB's rationale in *D.R. Horton*." [16] Instead, the Eighth Circuit joined "fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the [Fair Labor Standards Act]."[17] As the Eighth Circuit put it, the FLSA contained no "contrary congressional command" overriding the liberal policy favoring arbitration contained in the FAA, and that the Court owed "no deference to [the NLRB's] reasoning"—citing a long list of district court cases that similarly rejected the analysis in *D.R. Horton*.[18]

Months later, even the Ninth Circuit Court of Appeals appeared to reach a similar conclusion in *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013). Although the question on appeal was whether the employer waived its right to compel arbitration, the plaintiff urged the Ninth Circuit to rely on the Board's decision in *D.R. Horton* in affirming the district court's decision to deny arbitration. The Ninth Circuit expressly declined to do so, stating that:

[T]he only court of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in D.R. Horton *because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16.*[19]

The three-judge panel reiterated the Supreme Court's pro-arbitration position as articulated in the Supreme Court's then-recent decision *American Express Company v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) stating that "courts must rigorously enforce arbitration agreements according to their terms" and that this "holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a contrary congres-

16 *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013).

17 *Id.*

18 *Id.* at 1054.

19 *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-74 (9th Cir. 2013).

sional command."[20]

Soon after the Eighth Circuit's ruling, the Second Circuit became the second federal court of appeals to expressly reject the Board's holding in *D.R. Horton*. In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013), an employee sought to invalidate a class action waiver in order to pursue a claim under the FLSA. Like the Eighth Circuit, the Second Circuit also followed the analysis put forth by the Supreme Court in *CompuCredit Corporation* and *Italian Colors*, which required enforcement of an arbitration agreement unless overridden by a "contrary congressional command," even if the claimant had no economic incentive to pursue a claim individually in arbitration. The Second Circuit, noting that "Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context[,]"[21] found that the FLSA contained no such command. It further declined to follow *D.R. Horton*, because "[e]ven assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning."[22]

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D.R. Horton at the Fifth Circuit

Although the decisions mentioned above refuted the Board's reasoning in *D.R. Horton*, the Board could, perhaps, argue that the cases were not directly on point as they did not deal explicitly with the NLRA. However, no such equivocation could be applied with regard to the Fifth Circuit.

After the Board ruled against it, D.R. Horton filed a petition for review in the Fifth Circuit. On December 3, 2013, that court issued its opinion. It acerbically described the Board's view of class action waivers as follows: "when

20 *Id.* at 874. The Ninth Circuit would later revisit the issue raised in *D.R. Horton* in *Morris v. Ernst & Young*, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016), discussed *infra*.
21 *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 (2d Cir. 2013).
22 *Id.* (internal citations and quotations omitted).

private contracts interfere with the functions of the NLRA, the NLRA prevails" and "the policy behind the NLRA trumped the different policy considerations in the FAA that supported enforcement of arbitration agreements."[23]

The Fifth Circuit then proceeded to thoroughly dismantle these theories. It began with an overview of the FAA, under which it made clear that arbitration agreements must be enforced according to their terms unless subject to the FAA's "savings clause" or precluded by another statute's "contrary congressional command."[24] The Fifth Circuit, in painstaking detail, analyzed why neither exception applied to the NLRA. First, it wrote, the savings clause could not be a basis for invalidating class action waivers since requiring a class mechanism would actually serve as an impediment to arbitration, thus violating the FAA. Second, after analyzing the legislative history and congressional intent of the FAA, the Fifth Circuit determined that the NLRA contained no "explicit language of a congressional intent to override the FAA."[25] It held that class actions are not a substantive right, and that "there are numerous decisions holding that there is no right to use class procedures under various employment-related statutory frameworks."[26]

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Thus, the Fifth Circuit determined, while the Board was typically entitled to "judicial deference," such deference "cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption of major policy

23 *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 358 (5th Cir. 2013).

24 *Id.*

25 *Id.* at 360.

26 *Id.* at 357.

decisions properly made by Congress."[27] Moreover, it stated in no uncertain terms that "the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."[28] The Fifth Circuit's ruling was, to put it mildly, a sharp rebuke of the Board.

Moreover, it stated in no uncertain terms that "the Board has not been commissioned to effectuate the policies of the National Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." The Fifth Circuit's ruling was, to put it mildly, a sharp rebuke of the Board.

The Board Doubles Down in *Murphy Oil USA, Inc.*

Most regulators, in the face of hostile rulings from numerous circuit courts and even state courts,[29] would have taken a step back and reevaluated their approach to an issue. Remarkably, however, on October 28, 2014, the Board doubled down on *D.R. Horton* in a case called *Murphy Oil USA,*

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27 *Id.* at 356.

28 *Id.*

29 *See* discussion *infra* of *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014) (Supreme Court of California case which rejected *D.R. Horton* by a 6-1 majority); *see also Neary v. MasTec N. Am., Inc.*, 33 Mass. L. Rep. 332 (Mass. Super. Ct. 2016) (Supreme Court of Massachusetts case rejecting plaintiff's argument that a class action waiver restricted his Section 7 rights because "the NLRB's decision in [*D.R. Horton*] directly contradicts the United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Company v. Italian Colors Restaurant*" and noting that the "majority of federal courts have also declined to follow the NLRB's decision"); *Tallman v. Eighth Judicial Dist. Court*, 359 P.3d 113, 123 (Nev. 2015) (Supreme Court of Nevada case rejecting argument that the NLRA invalidates class action waivers because in light of the "liberal federal policy favoring arbitration" the NLRA "cannot fairly be taken as a contrary congressional command sufficient under *CompuCredit* to override the FAA") (internal citations and quotations omitted).

Inc., in which it once again held that class action waivers violated the NLRA.[30] Although the Board acknowledged that its decision in *D.R. Horton* had "been rejected by the U.S. Court of Appeals for the Fifth Circuit and viewed as unpersuasive by decisions of the Second and Eighth Circuits," it nonetheless declared: "Today we reaffirm that decision."[31]

Remarkably, however, on October 28, 2014, the Board doubled down on D.R. Horton *in a case called* Murphy Oil USA, Inc.*, in which it once again held that class action waivers violated the NLRA.*

The Board articulated at least three reasons for its bold pronouncement. First, it claimed that scholarly support for the Board's approach was "strong." Second, it stated that no Supreme Court decision spoke directly to the issues involved in *D.R. Horton*. Third, the Board argued that it was "not required to acquiesce in adverse decisions of the Federal courts in subsequent proceedings not involving the same parties."[32] Put simply, the Board declared that it was refusing to acquiesce in the opinions issued by the various courts. Instead, it concluded, "[h]aving reaffirmed the *D. R. Horton* rationale, we apply it here[.]"[33] In so doing, the Board found that Murphy Oil had violated Section 8(a)(1) of the Act by requiring employees to agree to resolve all employment-related claims through individual arbitration and by taking steps to enforce the agreements in federal district court.

The most interesting of the three reasons was the last, the Board's self-declared "non-acquiescence" policy, which has been in place since 1957.[34] While the Board has observed this non-acquiescence policy for decades, the current NLRB has been particularly obstinate in its use. As the D.C. Circuit re-

30 *Murphy Oil USA, Inc.*, 2014 NLRB LEXIS 820 (2014).

31 *Id.* at *7.

32 *Id.* at *10.

33 *Id.* at *11.

34 *See, e.g.*, *NLRB v. Little River Band of Ottawa Indians Tribal Gov't*, 788 F.3d 537, 561 (6th Cir. 2015) ("In further explanation, the Board also noted its prerogative, pursuant to its 'nonacquiescence policy,' to respectfully disagree with the Tenth Circuit."). *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957).

cently pointed out in a September 2016 decision (*Heartland Health Care Center*), the current Board's approach to nonacquiescence "takes obduracy to a new level."[35] Further, the Court noted that "what the Board proffers as a sophisticated tool towards national uniformity can just as easily be an instrument of oppression[.]"[36] Finally, the Court stated that the current Board's interpretation of non-acquiescence amounted to a "putsch."[37]

Given the Board's specious reasoning in *Murphy Oil* the dissents were vigorous and lengthy. Member Harry Johnson, III argued that the Board must accommodate the NLRA to the FAA, and that none of the majority's rationales could "salvage" the holding in *D.R. Horton*. In his view, since the Supreme Court already applied the FAA in *Italian Colors* to another federal statute, the Sherman Act, its interpretation "also applies to the FAA's interplay with Section 7's substance[.]"[38] Member Johnson wrote that "by asserting that Section 7 has unique, important goals and is 'sui generis[,]'" the majority discounted the Supreme Court's directive in *Italian Colors* even though *D.R. Horton* also "clearly dealt with a federal-statute-versus-FAA conflict question[.]"[39] He rejected the majority's reasoning, since declaring the NLRA sui generis would result in every federal statute being declared sui generis, thus rendering the Supreme Court's FAA cases meaningless. He concluded, simply:

Given the Board's specious reasoning in Murphy Oil *the dissents were vigorous and lengthy.*

The rationale for nonacquiescence—the Board's statutory role in the interpretation of the Act and the fact that the only court authorized to interpret the Act for the entire country is the Supreme Court—has no application whatsoever to

35 *Heartland Plymouth Court MI, LLC, doing business as Heartland Health Care Center – Plymouth Court v. National Labor Relations Board*, No. 15-1034, D.C. Cir.; 2016 U.S. App. LEXIS 17688.

36 *Id.*

37 *Id.*

38 *Murphy Oil USA, Inc.*, 2014 NLRB LEXIS 820, at *247-48 (2014) (Johnson, H., dissenting).

39 *Id.* at *246-47.

the proper interpretation of the Federal Arbitration Act, the Federal Rules of Civil Procedure, the Fair Labor Standards Act, the Norris-LaGuardia Act, and the Rules Enabling Act. Interpretation of those laws is the province of the courts, and with the courts nearly universally rejecting the D. R. Horton *theory, the Board should defer to their rulings.*[40]

Strangely, one of the majority's criticisms of Member Johnson's dissent was his "overriding concern to avoid, at all costs, a conflict with the Federal courts[,]"[41] or in other words, his adherence to established precedent.

Member Philip Miscimarra's dissent was equally as strong in its legal opposition to the majority's holding, but more subtle in tone. He criticized the majority's attempt to grant itself jurisdiction over the FAA, "a statute that confers jurisdiction on the court, *not* the NLRB"[42] as an "unworkable" regulatory scheme that is "incompatible with the Board's statutory duty to accommodate and to avoid undermining Federal laws other than the NLRA."[43] He criticized the Board's "haphazard, redundant and self-contradictory enforcement efforts regarding non-NLRA laws that, substantively and procedurally, are enforced by courts and agencies other than the NLRB."[44]

*On appeal, the Fifth Circuit once again invalidated the Board's approach to arbitration agreements. In an opinion dated October 25, 2015, the Fifth Circuit dedicated a section to "*D.R. Horton *and Board Nonacquiescence" in which it observed that in* Murphy Oil *the "Board disregarded this court's contrary* D.R. Horton *ruling" issued less than two years ago.*

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40 *Id.* at *276.

41 *Id.* at *53.

42 *Id.* at *136. (Miscimarra, P., dissenting) (emphasis original).

43 *Id.* at *140.

44 *Id.* at *139.

Horton and Board Nonacquiescence" in which it observed that in *Murphy Oil* the "Board disregarded this court's contrary *D.R. Horton* ruling" issued less than two years ago.[45] As such, it refused to "repeat its analysis," thus resulting in a rather short opinion.[46] Although it overruled the Board, the Fifth Circuit declined Murphy Oil's invitation to hold the Board in contempt, instead stating that "'[w]e do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence."[47]

Post-*D.R. Horton* and *Murphy Oil*: The Board Creates a Circuit Split

Despite the Fifth Circuit's second rebuke and the ongoing litany of rejection in other courts, the Board persisted in prosecuting employers for maintaining arbitration agreements. In *Lincoln Eastern Management Corporation*,[48] for instance, the Board found that "[b]y maintaining a mandatory arbitration policy under which employees are required, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act."[49] Notably, the Board made these rulings despite the fact that on December 14, 2015, the Su-

45 *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1018 (5th Cir. 2015).

46 *Id.*

47 *Id*. Subsequently, the Board filed a petition for review of the *Murphy Oil* decision with the Supreme Court, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (Sept. 9, 2016) (No. 16-307).

48 *Lincoln E. Mgmt. Corp.*, 2016 NLRB LEXIS 405 (May 31, 2016); *see also Adriana's Ins. Servs.*, 2016 NLRB LEXIS 406 (May 31, 2016) (affirming the administrative law judge's ruling that the employer violated NLRA by enforcing an arbitration agreement that required its employees to waive their rights to pursue class or collective actions); *Century Fast Foods, Inc*., 2016 NLRB LEXIS 45 (Jan. 20, 2016) (holding that even if an arbitration agreement does not include an express waiver of class and collective actions, it is unlawful for the employer to interpret the agreement to bar such actions by moving in court to compel arbitration on an individual basis).

49 *Lincoln E. Mgmt. Corp.*, 2016 NLRB LEXIS 405, at *12.

preme Court issued yet another pro-arbitration decision, *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015), in which it upheld a class action waiver in the arbitration provision of a service agreement and rejected a claim that the waiver could be invalidated by state law.

If the Board hoped that by continuing to rule against class action waivers it would ultimately find at least one court to rule its way, that hope was fulfilled on May 26, 2016. In *Lewis v. Epic Systems Corp*oration, the Seventh Circuit upheld the Board's approach to arbitration agreements in a case that involved a collective action under the FLSA.[50] On appeal, the Seventh Circuit adopted *D.R. Horton* and held that the "right to collective action in section 7 of the NLRA is not, however, merely a procedural one."[51] Instead, the right "lies at the heart of the restructuring of employer/employee relationships that Congress meant to achieve in the statute."[52] In its opinion, the Seventh Circuit wrote: "The NLRA's history and purpose confirm that the phrase 'concerted activities' in Section 7 should be read broadly to include resort to representative, joint, collective, or class legal remedies."[53] The Seventh Circuit was unpersuaded by the fact that Rule 23 class actions did not exist in 1935 when the NLRA was passed. It also rejected other circuit court of appeals opinions, citing its own precedent, which prohibited workers from bargaining individually. Relying on the FAA's savings clause, the Seventh Circuit stated simply: "We are aware that the circuits have some differences of opinion in this area, although those differences do not affect our analysis here."[54]

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50 *Lewis v. Epic Sys. Corp.*, 2016 U.S. App. LEXIS 9638 (7th Cir. Wis. May 26, 2016).

51 *Id.* at *23.

52 *Id.* at *23-24.

53 *Id.* at *6.

54 *Id.* at *12. Epic Systems subsequently filed for review by the Supreme Court, becoming the first of three to do so in September 2016. *See Lewis v. Epic Sys. Corp.*, 2016 U.S. App. LEXIS 9638 (7th Cir. Wis. May 26, 2016), *petition for cert. filed*, 2016 U.S. Briefs 285 (U.S.

Exactly one week later, the Eighth Circuit considered the identical issue and reached an opposite conclusion in *Cellular Sales of Missouri v. NLRB*.[55] The Eighth Circuit, unpersuaded by the recent Seventh Circuit decision, rejected the Board's position, stating that "[t]he Board acknowledges that its position has twice been rejected by the Fifth Circuit, and it concedes that our holding in *Owen* is fatal to its argument 'that a mandatory agreement requiring individual arbitration of work-related claims' violates the NLRA."[56]

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The back and forth between courts of appeals continued with the August 22, 2016, decision by the Ninth Circuit, *Morris v. Ernst & Young*.[57] There, the Ninth Circuit joined the Seventh Circuit in holding that mandatory class waivers violate the Act.[58] Unlike the previous Ninth Circuit decision, *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013), in which the class action waiver issue was secondary, the issue was central to the *Morris* case. Chief Judge Sidney R. Thomas, writing for the 2-1 majority, concluded that "[c]oncerted activity—the right of employees to act together—is the essential, substantive right established by the NLRA" and is based on the "well-established-principle" that "employees have the right to

Sept. 2, 2016) (No. 16-285).

55 *Cellular Sales of Mo., LLC v. NLRB*, 2016 U.S. App. LEXIS 10002 (8th Cir. June 2, 2016).

56 *Id.* at *8.

57 *Morris v. Ernst & Young*, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016).

58 *Id.* at 4.

pursue work-related legal claims together."[59] Judge Thomas, finding that Section 7 of the Act protects the right to "pursue concerted work-related legal claims,"[60] concluded that the FAA did not dictate a contrary finding. In his reasoning, the issue was not the fact that the employer's arbitration agreement *mandated* individual arbitration but rather that it *forbade* participation in a class or collective action. Thus, the relevant inquiry was whether parties could ever contract around the right to engage in a class or collective action, whether in arbitration or any forum. Based on the majority's finding that the right to collective action is substantive, it reasoned that parties cannot privately contract their collective rights away, regardless of the forum:

The same provision in a contract that required court adjudication as the exclusive remedy would equally violate the NLRA. The NLRA obstacle is a ban on initiating, in any forum, concerted legal claims—not a ban on arbitration. . . . The illegality of the [class action waiver] here has nothing to do with arbitration as a forum. It would equally violate the NLRA for Ernst & Young to require its employees to sign a contract requiring the resolution of all work-related disputes in court . . . .[61]

Judge Ikuta concluded that the "majority ignores the thrust of Supreme Court precedent and declares that arbitration is precluded because it interferes with a substantive right protected by § 7 and § 8 of the NLRA." Nowhere in the NLRA, however, did Congress provide a clear congressional command as required by Supreme Court precedent.

Judge Sandra S. Ikuta, the lone dissenter, criticized the majority's holding as "breathtaking in its scope and in its error; it is directly contrary to the Supreme Court precedent and joins the wrong side of a circuit split."[62] Judge Ikuta noted that "in

59 *Id.* at *5.
60 *Id.* at *10, 13.
61 *Id.* at *16, 18.
62 *Id.* at *33.

every case in which the Supreme Court has conducted this analysis of federal statutes, it has harmonized the allegedly contrary statutory language with the FAA and allowed the arbitration agreement at issue to be enforced according to its terms."[63] After discussing in detail the long line of pro-arbitration Supreme Court cases, and observing that the majority's reasoning had already been put forth and rejected, Judge Ikuta concluded that the "majority ignores the thrust of Supreme Court precedent and declares that arbitration is precluded because it interferes with a substantive right protected by § 7 and § 8 of the NLRA."[64] Nowhere in the NLRA, however, did Congress provide a clear congressional command as required by Supreme Court precedent.[65]

The Ninth Circuit's decision in *Morris*, while not entirely surprising, was interesting for several reasons. First, it failed to mention or harmonize its holding with the earlier decision *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013), in which another three-judge panel of the Ninth Circuit had rejected the reasoning and argument contained in *D.R. Horton*.[66] Second, it also ignored another major California case, albeit not binding on the Ninth Circuit. On June 23, 2014, two years prior to *Morris*, the Supreme Court of California had thoroughly rejected *D.R. Horton* by a 6-1 majority in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348 (2014). In *Iskanian*, after laying out the Board's and Fifth Circuit's position with regard to *D.R. Horton*, Justice Liu stated in no uncertain terms: "We agree with the Fifth Circuit that, in light of *Concepcion*, the Board's rule is not covered by the FAA's savings clause. . . . We also agree that there is no inherent conflict between the FAA and the NLRA as that term is understood by the United States Supreme Court."[67]

On one hand, the Supreme Court of California's decision may have

63 *Id.* at *37-38.

64 *Id.* at *44.

65 *Id.* at *45-49. Ernst & Young LLP subsequently filed for review by the Supreme Court, which is currently pending along with two other petitions, *Morris v. Ernst & Young*, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016), *petition for cert. filed*, 2016 U.S. Briefs 300 (U.S. Sept. 8, 2016) (No. 16-300).

66 *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013).

67 *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 372 (2014).

surprised some, since state courts in California have generally taken some of the most anti-employer positions in the nation, including the decision just years earlier that "the prohibition of classwide relief would undermine the vindication of the employees' unwaivable statutory rights[.]"[68] On the other hand, the Supreme Court of California's decision was the only reasonable outcome in harmony with the U.S. Supreme Court's cases affirming the liberal policy favoring arbitration under the FAA. In reaching its conclusion, the Supreme Court of California acknowledged as much, citing the U.S. Supreme Court's precedent as established by *Concepcion*, *Italian Colors*, and *CompuCredit* as well as noting that its "conclusion is consistent with the judgment of all the federal circuit courts and most of the federal district courts that have considered the issue."[69]

Next Stop: The Supreme Court?

The existence of a circuit split may pave the way for the Supreme Court to finally weigh in on the issues presented in *D.R. Horton*. As of this writing, three petitions for a writ of certiorari from three separate cases are pending before the Supreme Court, one each filed by the Board, Epic Systems, and Ernst & Young within a week period in September 2016.[70] The Board filed its petition last, even though the Fifth Circuit *Murphy Oil* decision of which it seeks review predated the pro-Board decisions in *Epic Systems* and *Ernest & Young*. This is a strong indicator that the Board strategically pursued its agenda across multiple circuits then waited for a favorable decision at the ap-

68 *Gentry v. Superior Court*, 42 Cal. 4th 443, 450 (2007).

69 *Iskanian*, 59 Cal. 4th at 373.

70 *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *petition for cert. filed* (Sept. 9, 2016) (No. 16-307); *Morris v. Ernst & Young*, 2016 U.S. App. LEXIS 15638 (9th Cir. Aug. 22, 2016), *petition for cert. filed*, 2016 U.S. Briefs 300 (U.S. Sept. 8, 2016) (No. 16-300); *Lewis v. Epic Sys. Corp.*, 2016 U.S. App. LEXIS 9638 (7th Cir. Wis. May 26, 2016), *petition for cert. filed*, 2016 U.S. Briefs 285 (U.S. Sept. 2, 2016) (No. 16-285). A fourth petition has also been filed, see No. 16-388, *Patterson v. Raymours Furniture Company, Inc.* The petitioner, however, has not asked the court to grant review in her case but instead has urged the court to grant review in *Murphy Oil* and hold *Patterson* pending review.

pellate level to cite in its petition to the Supreme Court. Presently, the Supreme Court consists of eight justices, four appointed by Republicans and four by Democrats, which suggests that the November elections may have had an outsized influence on the resolution of the issue.

However, regardless of election results, the Supreme Court's prior case law should determine the contours of a decision on class action waivers. Beginning in *Gilmer* and extending more recently to *Concepcion*, *Italian Colors*, *CompuCredit*, and *DirecTV*, the Supreme Court has repeatedly affirmed the "liberal federal policy favoring arbitration agreements"[71] under the Federal Arbitration Act, even in the face of numerous challenges. In each case, the result has been that a court's requirement to enforce an arbitration agreement remains except in instances of a "contrary congressional command," which numerous courts have failed to find with regard to the NLRA.

While a pro-arbitration ruling by the Supreme Court would help clear up the current uncertainty around employment arbitration agreements, a newly constituted NLRB can take steps to resolve the issue as well. Quite simply, the new Board should overturn *D.R. Horton*. Ideally, Congress could solidify the matter even further by amending either the FAA or the NLRA to clarify that employment arbitration agreements do not violate Section 7 rights.

Conclusion

The NLRB has been a lightning rod of controversy during the Obama administration. It has overturned numerous longstanding precedents, challenged many common sense employment policies, and created a great deal of uncertainty for both workers and employers. Yet its actions with regard to class action waivers, as exemplified in *D.R. Horton* and *Murphy Oil*, present the unique spectacle of an executive branch agency asserting its preeminence over numerous rulings by the judicial branch, which of course is enforcing the commands of the legislative branch. This would not be the first time the Supreme Court has had to deal with executive overreach regarding the Obama-era NLRB.[72] One hopes that the Justices will render as strong a verdict here.

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71 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

72 *See, e.g.*, *NLRB v. Canning*, 134 S. Ct. 2550 (2014).

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